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Supreme Court, U.S.  
FILED

No. \_\_\_\_\_

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In The

**Supreme Court of the United States**

— ♦ —  
A. STEPHAN BOTES,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

— ♦ —  
**On Petition For Writ Of Certiorari  
To The United States Court Of Appeals  
For The Eleventh Circuit**

— ♦ —  
**PETITION FOR A WRIT OF CERTIORARI**

— ♦ —  
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## QUESTIONS PRESENTED

- I. Whether the Eleventh Circuit Court of Appeals erred by accepting the government's position that appearance of impropriety is *not* the proper standard for recusal of trial court and judicial candidates.
- II. Whether the Eleventh Circuit Court of Appeals appellate review for "unreasonableness" has preserved de facto mandatory Guidelines, contrary to this Court's ruling in *Booker*<sup>1</sup> and its progeny.

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<sup>1</sup> *Booker v. United States*, 125 S.Ct. 738, 543 U.S. 220 (2005).

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## PETITION FOR A WRIT OF CERTIORARI

A. Stephan Botes petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

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## OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The order of the Eleventh Circuit affirming Petitioner's conviction and sentence, was filed on August 25, 2008, and is unpublished. It is attached as Appendix A. The order of the Eleventh Circuit denying the petition for rehearing and rehearing *en banc* was denied on October 27, 2008, and is attached as Appendix B.

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## JURISDICTION

The Court of Appeals affirmed Botes' conviction and sentence on August 25, 2008. Botes' petition for rehearing and rehearing *en banc* was denied on October 27, 2008. The Honorable Clarence Thomas granted petitioner's motion for a continuance in the time to file his application for *certiorari*, setting the date of March 26, 2008. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

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### **STATUTE INVOLVED**

The Sentencing Reform Act of 1984 (SRA) (Pub. L. 98-473, Title II, Ch. II, October 12, 1984, 98 Stat. 1987).

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### **CONSTITUTIONAL PROVISIONS INVOLVED**

The Fifth Amendment to the Constitution provides "No person shall be held to answer for a . . . crime, unless upon a presentment or indictment of a Grand Jury" and that a criminal defendant is entitled to "due process of law." The Sixth Amendment to the United States Constitution provides for a jury trial in all criminal prosecutions and that the defendant be informed of the nature and cause of the accusation.

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### **STATEMENT OF THE CASE**

The Eleventh Circuit's decision of August 25, 2008, affirmed Botes' conviction and sentencing after a jury trial. Botes was convicted in the federal prosecution of former Georgia gubernatorial candidate, Linda Schrenko, who was the ex-State School Superintendent, along with other school board staff and people associated with Botes' company.

Botes was convicted of conspiracy to embezzle federal funds and deprive Georgia of Linda Schrenko's honest services, twelve counts of aiding and abetting embezzlement of federal funds, and

three counts of wire fraud.<sup>2</sup> He was acquitted on the remaining thirty-three counts of wire fraud, money laundering, and structuring.

The conspiracy count alleged Schrenko and Temple, who was her lover and campaign manager, gave Botes' company contracts for computer software and technical assistance. In turn, Botes was alleged to have funneled money to Schrenko's campaign to become the Republican nominee for Governor of Georgia. Botes denied the charges and maintained Temple conspired with Botes' controller and an outside consultant to steal money from his business and funnel it to the campaign. Schrenko subsequently testified she had no conspiratorial dealings with Botes, and all of her information came from Temple. Temple, who had double-crossed the government, was not called as a witness in the case, but Schrenko's mid-trial plea allowed the government to use alleged statements made to and by Temple against Botes at trial.

Botes' case garnered a great deal of publicity because of his co-defendant, Linda Schrenko. The first day of trial, testimony was cut short for the district court to attend a judicial obligation. The judges of the Northern District of Georgia were

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<sup>2</sup> Botes was convicted on count one: violation of 18 U.S.C. § 371; counts two to twelve, aiding and abetting embezzlement of federal funds 18 U.S.C. §§ 666(a)(1)(A), 2; counts eighteen, twenty, and twenty-one, wire fraud 18 U.S.C. §§ 1343, 1346, 2.

meeting to select the new magistrate judge, and the trial court supported Vineyard, who was also the lead prosecutor in the Schrenko/Botes prosecution.

The next day it was announced Vineyard had been selected as the new magistrate judge in the district. Botes move for mistrial based on an appearance of impropriety. The government opposed the motion and argued appearance of impropriety was not the proper standard. The district court overruled the motion for mistrial.

On appeal to the Eleventh Circuit, Botes again raised the issue, contending his trial was fundamentally flawed by the appearance of impropriety from the outset. He pointed to several actions during the trial which supported his contention there was an appearance of impropriety surrounding the case, stemming from the trial judge's active participation and support of the man who was prosecuting Botes.

Botes raised other weighty issues regarding the lawfulness of his conviction. He contended the jury was inaccurately and insufficiently instructed regarding his intent and his theory of defense. Consequently, the jury lacked critical tools for analyzing the evidence, leading to Botes' erroneous conviction on fifteen counts, despite acquittal on the remaining thirty-three counts. Botes also established in his appellate brief he was not allowed to present critical evidence, and the court improperly allowed inadmissible hearsay evidence to infect the jury.

Finally, Botes urged the Eleventh Circuit to reverse his 97-month sentence because the district court explicitly failed to consider the 18 U.S.C. § 3553(a) factors, misapprehending its responsibility to consider the Guidelines as but one of the enumerated factors, and to select a sentence no greater than necessary to achieve the purposes of the statute.

In a single sentence, the Eleventh Circuit dismissed all of Botes' arguments, despite the fact they were well grounded in fact, and law. In summarily rejecting Botes' appeal, the Eleventh Circuit allowed the district court to reject an appearance of impropriety as the proper standard for recusal, and allowed an unconstitutional sentence to stand.

Mr. Botes is serving his sentence at the Federal Correctional Institution (contract facility) in Post, Texas.

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### REASONS FOR GRANTING THE WRIT

I. Botes respectfully requests this Court grant his petition, vacate his conviction and sentence, and remand his case to the Eleventh Circuit to consider his arguments in light of the Court's expected resolution in *Hugh M. Caperton v. A.T. Massey Coal Company*, 129 S.Ct. 593 (Mem.) (2008).

In *Caperton*, this Court granted *certiorari* to resolve a recusal issue. The *Caperton* Petitioner contends Due Process requires the recusal of West

Virginia Supreme Court Justice Benjamin from participation in his principal financial supporter's case. The resolution in *Caperton* necessarily depends on the Court's determination whether disqualification is required for an appearance of bias, or whether recusal is required only upon proof of actual bias. It appears the lower courts are split on the issue of whether Due Process prohibits both actual bias or the appearance of impropriety.

In Botes' case, the government argued appearance of impropriety was too "slender a reed" to support recusal of the prosecutor who was a judicial candidate and therefore subject to the same rules governing judges under Georgia Law, and the district court judge. The Eleventh Circuit provided no rationale for its decision, therefore, it must be assumed the lower court relied upon the argument of the government in rejecting the defense position regarding appearance of impropriety. Consequently, Botes' case should be held in abeyance pending the disposition of *Caperton*, and if the Court holds Due Process requires recusal of judges [and therefore judicial candidates under Georgia Law] upon a showing of an appearance of bias, he requests this court grant his petition, vacate his conviction and remand his case for the Circuit court to apply the correct standard.

II. Botes also requests this Court to grant his petition, vacate his sentence and remand his case for the Circuit to reconsider its summary rejection of his sentencing argument in light of this Court's recent decision in *Nelson v. United States*, \_\_ U.S. \_\_, 129

S.Ct. 890 (2009), which was issued after the Eleventh Circuit decided Botes' case.

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## **ARGUMENT AND CITATIONS OF AUTHORITY**

### **I. APPEARANCE OF IMPROPRIETY IS THE PROPER STANDARD FOR RECUSAL OF A JUDGE, AS WELL AS THE RECUSAL OF A JUDICIAL CANDIDATE.**

On the first day of trial the district court adjourned early to attend a "judicial obligation." The judicial obligation was the district court's participation in the selection of a new magistrate judge to replace a retiring judge. The next day the defense learned lead prosecutor in the case, Russell Vineyard, had been honored by selection as the new full-time magistrate judge in the district. His job duties would begin shortly after trial.

The position of United States Magistrate Judge is authorized by 28 U.S.C. § 631, *et seq.* Magistrate judges are selected by the district court judges of each district and perform a wide range of duties in order to assist and expedite the District Court docket. Essentially, the magistrate judge assists and "works" for the district court judge. The magistrate judge is forbidden to practice law while acting as a full time magistrate. Tellingly, if the position is part-time, the magistrate judge is not forbidden to practice law, but may not act as counsel in a criminal matter. 28 U.S.C. § 632.



Botes moved for mistrial and objected to Vineyard's prosecution of the case, which created an appearance of impropriety. Not only would Vineyard soon be working for the judge before whom the case was tried, but, the judge also informed the parties he supported and participated in the decision to select Vineyard.

Vineyard's prosecution of the case over the objection raising an appearance of impropriety was improper, and resulted in a trial with a "built in" appearance of impropriety. The court's rulings – whether intended to help a future colleague, or employee or not – appeared improper. Knowing their trial adversary soon would be ruling on their future pretrial motions, defense counsel expressed concern they could not vigorously defend. Nonetheless, the court denied the motion.

The district court should have granted the motion, or required the prosecution case to go forward with co-counsel, who was readily available, on the basis the prosecutor and the court are both charged with avoiding even the appearance of impropriety.

There was no question below the court and the attorneys all recognized the appearance of impropriety involved in a case where the lead prosecutor was appointed with the active support and participation by the district court. The district court certainly acknowledged it saying:

I'm concerned about the appearance that any decision I might make, especially with

regards to discretionary decisions in favor of the government, may be interpreted as my having done it simply because now you [Vineyard] you are about to become a magistrate judge. It does create a lot of problems. (Doc. 335-173).

The government's argument centered on its assertion only an actual conflict could disqualify counsel and the appearance of impropriety was insufficient. (Doc. 335-177). The Government tacitly acknowledged the appearance of impropriety during the in chambers conference when it said:

The government would respectfully request, ***given the significance of what's been raised, if we could report back to the court after having*** the opportunity to confer within my office, and, candidly with attorneys in Washington. (Doc. 335-185).

Thus, below, and in its appellate brief, the government argued, based on *Waters v. Kemp*, 845 F.2d 260, 265 n.12 (11th Cir. 1988) the "appearance of impropriety is simply too slender a reed on which to rest a disqualification order except in the rarest of cases," and that "appearance of impropriety standard was the standard under the old model code that was in effect until 2000." (Doc. 335-177; Government's brief in the Circuit Court at 37).

The Eleventh Circuit's acceptance of the government's position overlooks the fact that under the Georgia Rules of Professional Responsibility, the prosecutor, as a judicial candidate, is subject to the



Code of Judicial Conduct, requiring him to avoid even the appearance of impropriety. (See, Georgia Rules of Professional Conduct, Part IV (After January 1, 2001), Rule 8.2 Judicial and Legal Officials (b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct; The Code of Judicial Conduct includes candidates for judge, either by election or appointment; Cannon 2 states "Judges Shall Avoid Impropriety and the Appearance of Impropriety in All Their Activities."

This conclusion is inescapable, as the government acknowledged, "[m]otions to disqualify are governed by two sources of authority: the local rules of the court in which attorneys appear, and federal common law." (Government's brief in the Circuit Court, page 36). The government also acknowledged the Georgia Rules of Professional Conduct govern the professional conduct of bar members of the United States District Court for the Northern District of Georgia. *Id.*, citing N.D.Ga.R. 83.1(c). Thus, the Georgia Rules of Professional Responsibility as applied to the judicial candidate Vineyard, required him, through the Cannons of Judicial Conduct, Cannon 2, to avoid even the appearance of impropriety. The Eleventh Circuit opinion, which contained no analysis, necessarily concurred with the government's argument which overlooked and conflicted with controlling precedent.

Vineyard's recusal was required to avoid the appearance of impropriety, and if not, the district

court should have recused himself. 28 U.S.C. § 455(a). An appearance of impropriety is determined by a reasonableness standard – whether “an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge’s impartiality, and any doubts must be resolved in favor of recusal.” *United States v. Patti*, 337 F.3d 1317, 1321 (11th Cir. 2003) (citations omitted). A reasonable lay person, upon learning the trial judge had recently selected the prosecutor to a position on the same court, and working for the court, would question whether the court could act without bias and whether the appointment would incur bias and unfairness in the judicial system trying Botes.

This was a close case. Botes was acquitted on the majority of counts after the jury deliberated for days. Lay observers could conclude the court, however unintentionally, ruled in the government’s favor at a crucial time – a ruling tipping the scales of justice. Similarly, defense counsel may not have argued quite as forcefully against Judge Vineyard’s position as they might have against prosecutor Vineyard’s position. Lay observers could conclude this reluctance tipped the scales of justice. Indeed, a legal observer could easily conclude the same in the context of the court’s erroneous jury instruction in answer to the jury’s final question.

The Eleventh Circuit’s decision overlooks the proper standard as applied to the prosecution’s recusal when the prosecutor was a “judicial candidate” within

the meaning of the Canons of Judicial Conduct, is avoiding the appearance of impropriety. The Circuit court overlooked its own precedent emphasizing the duty to recuse under 28 U.S.C. § 455(a) is "affirmative, self-enforcing obligation to recuse *sua sponte* whenever proper grounds exist." *United States v. Kelly*, 888 F.2d 732 (11th Cir. 1989).

Petitioner respectfully requests this Court hold this case for its decision in *Caperton*, and in the event the Court finds appearance of bias requires recusal, to vacate his conviction and remand the case for Eleventh Circuit to apply the proper standard.

## II. THE DISTRICT COURT TREATED THE SENTENCING GUIDELINES AS *DE FACTO* MANDATORY IN VIOLATION OF THE FIFTH AND SIXTH AMENDMENTS.

The judge in Botes' case began the sentencing explicitly stating he was imposing sentence within the guideline range. At the conclusion of the hearing the judge explicitly noted he had *not* sentenced Botes based on the 18 U.S.C. § 3553(a) factors. Both statements are fatal to the constitutionality of Botes' sentence, as they reveal the judge was operating under a presumption that a guideline sentence should be imposed, and its task was either to impose a sentence under § 3553 or the Guidelines. The judge's application of this presumption, coupled with his inattention to the mandatory § 3553 factors, resulted in the court's imposition of an unreasonably harsh,

97-month sentence, defying the "parsimony provision" of § 3553. Because the record is clear the judge did not consider the factors within the meaning of the remedial portion of *Booker v. United States*, 543 U.S. 220, 125 S.Ct. 738 (2005), the sentence is reversible on this ground.

The record is also clear the judge indulged in an unconstitutional presumption the Guidelines applied. Because the Eleventh Circuit failed in its duty to reverse the sentence in this case, this Court should exercise its supervisory powers and grant this petition, vacate the sentence and remand the case to the Eleventh Circuit in light of this Court's holding in *Nelson v. United States*, \_\_\_ U.S. \_\_\_, 129 S.Ct. 890 (2009).

Almost immediately upon taking the bench, directly after the judge stated the sentencing options he said:

Before the court imposes a sentence *within the applicable custody guideline range*, the Court wishes to resolve the pending guideline issues. (R29-4) (emphasis added).

After making guidelines determinations, the judge reiterated he was going to impose a sentence within the guideline range, stating:

... the Court is now ready to sentence the defendant, ... *within the applicable custody range*, which is now 97-121 months. (R29-29) (emphasis added).

Before hearing any evidence, argument, or allocation, the judge demonstrated he was only considering a Guidelines sentence instead of considering the § 3553 factors.

Botes asked the judge for a non-guidelines sentence in light of § 3553(a) factors. The judge, consistent with his earlier pronouncements regarding the Guidelines, imposed a sentence of 97-months, stating:

Let the record reflect the Court had considered sentencing the defendant pursuant to 18 U.S.C. § 3553 and the factors outlined therein. However, the Court decided *not* to since a more appropriate sentence can be imposed pursuant to the custody guideline range as outlined in the U.S. Sentencing Commission. Also, the Court has sentenced the other defendants pursuant to the guideline range. (R29-67).

In order to avoid violating the Sixth Amendment, this Court held in *Booker* the sentencing court must not apply the Guidelines in a mandatory manner and the Guidelines are advisory. The *Booker* ruling now requires the court to consider the factors set forth in 18 U.S.C. § 3553(a) in fashioning a sentence which is "sufficient, but not greater than necessary, to comply with the purposes" set forth in § 3553(a)(2). Here, instead of following *Booker*, the judge stated he did *not* impose sentence with reference to the factors, but rather imposed a Guideline sentence, noting he imposed a Guideline sentence upon the co-defendants. The judge misconstrued the task of the sentencing

court, and left the remedial portion of *Booker* unfulfilled.

In *Rita v. United States*, 127 S.Ct. 2456 (2007), this Court, made clear it is error for the sentencing court to presume a sentence under the Guidelines should be imposed. The Court said: "[w]e repeat that the presumption before us is an *appellate* court presumption." *Rita*, at 2465 (emphasis in original). The Court also stated:

In determining the merits of these arguments, [regarding the application or not of the guidelines] the sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply. *Rita*, at 2465, *citing Booker*, 543 U.S., at 259-260.

Recently, in summarily reversing the Fourth Circuit in *Nelson v. United States*, this Court once again told the Circuit courts not to tolerate district court presumptions.

Since *Booker*, the Circuits have continued the practice of upholding all sentences within the Guideline range, reversing many below the range, and affirming sentences above the guideline range. See, Professor Berman, Sentencing Law & Policy Blog, noting *United States v. Gammicchia*, 498 F.3d 467 (7th Cir. 2007); and *United States v. Lessner*, 498 F.3d 185 (3rd Cir. 2007); *United States v. Hurn*, 496 F.3d 784 (7th Cir. 2007); *United States v. Ruhbayan*, 527 F.3d 107 (4th Cir. 2007), [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2007/week32/index.html](http://sentencing.typepad.com/sentencing_law_and_policy/2007/week32/index.html).



To date, counsel is aware of only one sentence within the guidelines range reversed by any circuit court for substantive unreasonableness. See, Professor Berman, Sentencing Law & Policy Blog, citing to *United States v. Paul*, 239 Fed.Appx. 353 (9th Cir. 2007), [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2007/08/ninth-circuit-r.html#comments](http://sentencing.typepad.com/sentencing_law_and_policy/2007/08/ninth-circuit-r.html#comments).

In cases such as Petitioner's, the Eleventh Circuit Court has also failed to engage in any meaningful analysis, and instead, summarily affirmed the sentence. Thus, the remedial portion of *Booker* has failed to cure the constitutional problem of mandatory guideline application.

The problem with Botes' sentence is in relying exclusively on the Guidelines, the court imposed a substantively unreasonable sentence – significantly longer than necessary to achieve the purposes of the Sentencing Reform Act – thereby violating the “parsimony provision” of 18 U.S.C. § 3553(a). As the parsimony provision is the overarching goal – to impose a sentence “‘sufficient, but not greater than necessary,’ to achieve the goals of sentencing,” the district court utterly failed in its task. *Kimbrough v. United States*, 128 S.Ct. 558, 570 (2007); 18 U.S.C. § 3553(a).

The mechanical application of the Guidelines' loss tables may overstate a defendant's culpability and lead to sentences that are not reasonable under 18 U.S.C. § 3553(a). This is particularly true in Botes' case where he received a 14 level increase due to the

amount of loss in the case and none of the mitigating factors are considered under the Guidelines' express prohibition. U.S.S.G. § 5H1.1 through 6.

This case involved a multi-week trial, coupled with acquittal on the majority of the counts. Completely ignored by the court was Botes' extraordinary personal background, lack of a criminal record, ruin of his business, loss of his home, probable deportation, and low risk of recidivism – all factors under § 3553(a) which should have been central to the sentencing analysis, rather than being overlooked for a mandatory application of the Guidelines. The judge's excessive reliance on the guidelines relative to the many other considerations set forth in § 3553(a) was procedurally unreasonable. The sentence should be reversed because the court failed to "reflect due consideration of the factors and policies that animate § 3553(a), thereby rendering the sentencing procedurally unreasonable". *United States v. Gibson*, 424 F.3d 1234, 1254 (11th Cir. 2005).

In *Booker*, Justice Scalia asked, "Will appellate review for 'unreasonableness' preserve de facto mandatory Guidelines by discouraging district courts from sentencing outside Guidelines ranges?" As long as the appellate courts are allowed to render opinions which contain no analysis and ignore the record of the district court committing procedural error, the answer in the Eleventh Circuit will remain, "yes."

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### CONCLUSION

Because the Eleventh Circuit failed in its duty to reverse the sentence in this case, this Court should exercise its supervisory powers and grant this petition, vacate the sentence and remand the case to the Eleventh Circuit in light of this Court's holding in *Nelson*.<sup>3</sup>

Dated: This 26th day of March, 2009.

Respectfully submitted,

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<sup>3</sup> Petitioner also requests that the Court hold his case for disposition on *Caperton v. Massey, supra*, and if the Court rules an appearance of bias requires recusal, for the Court to grant his petition, vacate his conviction and remand his case to the Eleventh Circuit on this ground as well.

App. 1

**APPENDIX A**

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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No. 06-15238

---

D. C. Docket No. 04-00568-CR-CC-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

A. STEPHAN BOTES,

Defendant-Appellant.

---

Appeal from the United States District Court  
for the Northern District of Georgia

---

**(Filed August 25, 2008)**

Before WILSON, PRYOR and COX, Circuit Judges.

PER CURIAM:

A. Stephan Botes was convicted of conspiracy to embezzle federal funds by a state agent and conspiracy to commit a scheme to defraud the State of Georgia and its citizens of money and honest services

## App. 2

(Count 1), embezzlement of federal funds (Counts 2-12), and wire fraud (Counts 18, 20-21). He was sentenced to 97-months' imprisonment and the district court entered an order of restitution and a criminal forfeiture judgment against him in the amount of \$382,394.

On appeal, Botes argues the following: (1) the denial of Botes's mistrial motion following the lead prosecutor's selection for a federal magistrate judgeship requires reversal of his convictions; (2) the evidence was not sufficient to support his conviction for conspiracy to defraud the state of Georgia and deprive Georgia of the honest services of state school superintendent Linda Schrenko; (3) the evidence was not sufficient to show that Botes aided and abetted a scheme to defraud Georgia; (4) the district court improperly instructed the jury on aiding and abetting; (5) the evidence was not sufficient to show that Botes engaged in a scheme to defraud Georgia via wires; (6) the district court's evidentiary rulings concerning testimony by Botes's business attorney Kauffmann and Schrenko require reversal; (7) the cumulative effect of the evidentiary rulings requires reversal; (8) the denial of Botes's requests for specific jury instructions deprived Botes of his right to present a theory of defense; (9) the district court improperly enhanced Botes's sentence for obstruction of justice under § 3C1.1 of the sentencing guidelines; (10) his sentence was unreasonable; (11) the sentencing court violated Botes's Sixth Amendment rights when it considered facts that were neither admitted

App. 3

by Botes nor found by the jury as part of their verdict; (12) the sentencing court denied Botes his right of allocution; (13) the factual basis for the order of restitution was clearly erroneous; (14) the order of forfeiture violated Botes's constitutional rights and was without statutory authority; and (15) Botes is entitled to access backup audiotape recordings of closing arguments and sentencing.

Upon careful review of the record and the parties' briefs, and with the benefit of having heard oral argument, we conclude that Botes's arguments have no merit. Accordingly, we affirm.

**AFFIRMED.**

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App. 4

**APPENDIX B**  
**IN THE UNITED STATES COURT OF APPEALS**  
**FOR THE ELEVENTH CIRCUIT**

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No. 06-15238-AA

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UNITED STATES OF AMERICA,  
Plaintiff-Appellee,  
versus  
A. STEPHAN BOTES,  
Defendant-Appellant.

-----  
Appeal from the United States District Court  
for the Northern District of Georgia  
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ON PETITION(S) FOR REHEARING AND  
PETITION(S) FOR REHEARING EN BANC

(Filed Oct. 27, 2008)

BEFORE: WILSON, PRYOR and COX, Circuit  
Judges.

PER CURLAM:

The Petition(s) for Rehearing are DENIED and no  
Judge in regular active service on the Court having  
requested that the Court be polled on rehearing en

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banc (Rule 35, Federal Rules of Appellate Procedure),  
the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Wilson

UNITED STATES CIRCUIT JUDGE

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